

COPY

U.S. DISTRICT COURT
DISTRICT OF IDAHO
Filed at 7/1 M

MAY - 1 1997

CLERK, U.S. DISTRICT COURT ¹
By PL Deputy
United States Bankruptcy Court
District of Idaho
Boise, Idaho

TERRY HIPWELL,

Debtor.

)
)
) Docket No. BK-96-02095-12
)
)
)

)
) Boise, Idaho
) April 18, 1997
) 9:30 a.m.
)

- PORTION OF HEARING ON
1) CONFIRMATION OF AMENDED PLAN (Continued)
2) MOTION TO DISMISS - TRAVELER'S (Continued)

TRANSCRIPT OF JUDGE'S RULING

CHAPTER 12

THE HONORABLE JIM D. PAPPAS, PRESIDING
UNITED STATES BANKRUPTCY JUDGE

COURT RECORDER:

BARBARA KECK
U.S. Bankruptcy Court

TRANSCRIPTION BY:

NORTHWEST TRANSCRIPTS, INC.
P.O. Box 890
Nampa, Idaho 83653-0890
(208) 466-2743

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

///

APPEARANCES:

FOR THE DEBTORS:

HOWARD FOLEY, Esquire
P.O. Box 10
Meridian, Idaho 83680
(208) 888-9111

FOR THE CREDITORS:

For Travelers:
RAMONA NEAL, Esquire
P.O. Box 2720
Boise, Idaho 83701
(208) 388-1200

For Amalgamated Sugar (TASCO):
RICHARD BOARDMAN, Esquire
P.O. Box 199
Boise, Idaho 83701
(208) 344-4566

For Landview:
JOHN D. HARRINGTON, Esquire
P.O. Box 247
Nampa, Idaho 83653-0247
(208) 466-9272

PROCEEDINGS IN PROGRESS

1
2 THE COURT: Thank you very much. I appreciate the
3 hard work of the lawyers involved. I know this is a difficult
4 case and I am sensitive to the critical nature of the timing
5 that we have involved here. And so rather than take it under
6 advisement, and study it, and give you a written decision, I'm
7 going to go ahead and announce my decision today, because I'm
8 fairly convinced that -- what that decision ought to be, so
9 these will be my oral findings of fact and conclusions of law
10 and I reserve the right to enter formal findings and
11 conclusions at a later date if I deem that appropriate.

12 I must, somewhat reluctantly, deny confirmation of
13 the plan. Let me approach this somewhat backwards and I think
14 you'll -- as a means of explaining why I say I'm reluctant in
15 denying confirmation of the plan.

16 I want to talk about the feasibility issue first as
17 opposed to talking about the rights of the individual
18 creditors. This farming operation is typical of many that we
19 see in Chapter 12, and as long as a reasonable effort has been
20 done by the Chapter 12 debtor to project yields and expenses
21 based upon the debtor's historical performance that are not
22 significantly out of line with overall performance, the
23 inclination of the Court is, as a matter of personal
24 preference and I think as a matter of Congressional policy
25 should be to give the debtor the benefit of the doubt. I

1 think the reason for that, it should be obvious here. As I
2 indicated I think the standard of proof under the code is not
3 that the debtor guarantee a feasible operation. If we were
4 all demanding guarantees from our farmers we just wouldn't
5 have very many of them. It's fraught with risk. I wouldn't
6 trade places with a farmer for anything in the world, frankly,
7 because of all the risk involved everyday in that business.
8 So I admire our farmers in that regard for their fortitude in
9 that.

10 Secondly, I think that because it's inherent and
11 because Chapter 12 is a rehabilitative chapter, a remedial
12 chapter. And Congress is telling us that if there's a way to
13 save family farms we ought to do it. And as long as the
14 rights of the parties can be reasonably protected through the
15 Chapter 12 plan, we give the benefit of the doubt I think to
16 the farmer and allow the farmer a chance to meet the farmer's
17 own reasonable goals. And we presume that mother nature will
18 cooperate. We presume that the market will cooperate. And we
19 presume that the Chapter 12 debtor will work very hard,
20 because, frankly, most all of them do. We don't hold those
21 things against the debtor.

22 Under those circumstances, from what I've heard from
23 the evidence and testimony, while I would agree that Mr.
24 Hipwell's crop production -- or crop yield estimates may be on
25 the optimistic side, I don't think they're so much on the

1 optimistic side as to be -- as has been characterized by the
2 creditors, unrealistic. I think -- I think they may be
3 challenging to obtain, but I don't think they are
4 unattainable. And I don't think any -- there is evidence to
5 the contrary there. I think it would take a very good year
6 for Mr. Hipwell to reach his projections here, but then I also
7 think that Mr. Hipwell would work -- knowing everything he
8 knows and all the pressures, that he would work very very hard
9 with the assistance of his experts to make sure that
10 everything is done to see that he meets his projections.

11 The reason I'm approaching it this way is because I
12 think, were the only the issue feasibility here, I would
13 likely confirm the plan and give Mr. Hipwell a one year chance
14 to meet his estimates. And, Mr. Hipwell, we would just let
15 you succeed or fail based on your own merit there. Based on
16 how good your own projections were. That's really the way I
17 believe this system ought to operate.

18 And so that's what I would like to do, but I can't.
19 And the reason I can't is because I -- that presumes that the
20 rights of the creditors will be properly protected by the
21 terms of the Chapter 12 plan while the debtor attempts to work
22 out of the problems.

23 And here are the concerns that I have here and, of
24 course, the applicable law here with respect to secured claims
25 is Section 1225(a) of the Bankruptcy Code. That's the

1 standard before confirmation. Standards for confirmation.
2 There's more than one of them of course.

3 With respect to TASCO, I think Mr. Boardman hits the
4 nail right on the head when he says that until the claim of
5 TASCO is disallowed that we have to presume that it is an
6 allowable claim. And by that, that means we can't ignore
7 TASCO's rights. That's not the same thing as saying that we
8 have to begin making payments to TASCO, but what it does mean
9 is I think you have to present a plan which, presuming that
10 the status of TASCO will not change, could work. And in this
11 case what we have is a plan which I think presumes that
12 TASCO's claim will be disallowed. And I think that's the
13 wrong approach and perspective when measured against the
14 bankruptcy laws.

15 In addition I really feel that in the absence of any
16 sort of payments in trust or any other kinds of protection for
17 TASCO, that given the nature of their collateral, and the fact
18 that it is used farm equipment and vehicles, and the
19 depreciation that it will inevitably suffer as a result of
20 normal wear and tear.

21 The cushion between the amount of TASCO's claim and
22 the value of its collateral is inadequate to protect it for a
23 period of two years.

24 I just think that if -- even if we take Mr. Foley's
25 approach and say, well, just give us two years to get this

1 determined in the state court, I'm afraid at the end of two
2 years, with the continued use of the equipment and the
3 continuing interest that would be allowed under 1225(a) on
4 TASCO's secured claim, that would expose TASCO to unreasonable
5 risk of loss.

6 Now I want to be clear here what I'm not holding.
7 I'm not holding that in order to confirm a plan you have to
8 begin making payments to TASCO in the same way that you make
9 payments to all other secured creditors that you do not
10 dispute. All I'm saying is that if you dispute the claim and
11 want time to pursue disallowance of the claim, you have to
12 insure that measures are incorporated into the plan that will
13 preserve the status quo and protect TASCO during that time
14 period against any continuing loss. In effect, what I'm
15 trying to do is preserve the situation today while the
16 litigation goes on and barring that, I don't think that we can
17 enhance TASCO's risk and still confirm the plan.

18 And in taking that approach I'm basically relying
19 upon the debtor's numbers as to what the claim is and what the
20 value of the security is.

21 Mr. Boardman, I don't know, by the way, if I've done
22 you any great favor here. Because I don't think simply
23 because I refuse to confirm this plan or even if I dismiss the
24 case, I don't think that converts to cash for you folks.

25 MR. BOARDMAN: I realize that, Your Honor.

1 THE COURT: Okay. With respect to Landview. Let me
2 explain how I see Landview's secured status and the problems I
3 see with the approach and to me they are the principle
4 concerns that the Court has with confirmation here.

5 Assuming the balance owed to Landview is somewhere
6 around a hundred and seventy-seven thousand dollars (\$177,000)
7 and -- as recited by counsel and I'm not making that finding,
8 I'm just using that as a starting point.

9 I find that under the security documents that I've
10 reviewed that they do have a secured interest in the 1996
11 wheat -- or grain crop and any remaining 1995 beet crop to
12 secure the full balance due under both '95 and '96 accounts.
13 I do that because of the dragnet clause in the 1996 account
14 agreement.

15 For whatever it's worth, Landview also has a
16 security interest, a subordinate security interest in the
17 debtor's equipment, not the titled vehicles, just the
18 equipment, to secure the 1996 credit and that credit only,
19 because that does not come within the dragnet clause.

20 I'm willing to accept the debtor's opinion that
21 there is forty-one thousand dollars (\$41,000) in equity in
22 that equipment, but I'm a little hesitant to do that, because
23 as I understood it, Mr. Foley, that also included the titled
24 vehicles. And I don't think Landview has a lien on the titled
25 vehicles. They don't have any titles. So, whatever value

1 they have in the equipment that is also a secured claim, but
2 let's face it, their principle security is the crop proceeds.

3 With respect to the real estate, the fact they have
4 a second mortgage on part of the farm I think is valueless.
5 They are effectively unsecured on the land, because of the
6 existence of the first mortgage in excess of -- what is it,
7 five hundred and seventeen or twenty thousand dollars? I
8 didn't really hear a good value opinion concerning the value
9 of the farm, but I didn't hear anyone suggest it was worth
10 more than five hundred and twenty thousand dollars (\$520,000)
11 and that's the critical issue here.

12 So under the Chapter 12 plan, because the debtor
13 wants to use the one hundred and five thousand dollars
14 (\$105,000) in crop proceeds, what the debtor must do is pay
15 Landview at least a hundred and five thousand dollars
16 (\$105,000), plus whatever value there is in the equipment over
17 the term of the plan, plus interest. Plus show me that
18 Landview has an adequate security position for that amount.

19 If the debtor intends to use the 1995 -- or excuse
20 me, '96 crop proceeds to farm in 1997, some sort of security
21 must be substituted for that money. And that's -- that's
22 absolutely clear.

23 In fact we -- we have local decisional law that
24 dates back to the late '80s I believe, right after Chapter 12
25 was adopted. I was still lawyering at the time, I think the

1 case is called Skyline Farms, that says "a debtor may not
2 offer as adequate protection for use of last year's crop
3 proceeds solely a lien on next year's crop proceeds". It's
4 just not adequate. There's just too many risk inherent in
5 that.

6 I've never -- I don't adhere to that strictly, but
7 where I -- where I would give the debtor a break there is not
8 the spring, it might be in the fall. I mean if we were
9 confirming a plan today and the debtor could come in and say,
10 gosh, you know, 30 days from now I'll be harvesting and the
11 crops look terrific and the price looks good and we could
12 really say that but for, you know, and in one month that we
13 would have a real good crop, I think maybe you could make a
14 case that a '97 lien is a good and adequate substitute for the
15 '96 money. But the problem is, this is April and there's so
16 many things that can happen between April and September or
17 October that I think, once again, the risk of loss is just too
18 great.

19 In addition, of course, realistically I think the
20 lien you can give Landview would have to, by necessity, be
21 subordinate to the lien that other creditors would request in
22 exchange for 1997 inputs.

23 You've already committed to pay for some seed, for
24 example, out the proceeds of the crop. And it seems to me
25 that to the extent there are fertilizer, chemical, other

1 inputs that go into the crop, those new creditors are entitled
2 to prior positions. That's just the way business is done. Of
3 course, that's my understanding of it anyway. And that goes
4 right down, by the way, to the hired labor I think anymore,
5 under Idaho's lien laws. They're to get theirs off the top
6 before we go paying, what amounts to Landview terms loan now,
7 we've converted from a one year loan, in effect, to a five
8 year loan, so.

9 Therefore, the Court finds that while the
10 feasibility issue is very very close, I would likely resolve
11 that in favor of the debtor and confirm the plan, were that
12 the only issue. Unfortunately that isn't the only issue. I
13 find that the debtor's proposed treatment under the amended
14 plan of both secured creditors TASCOCO and Landview, fertilizer
15 [sic] fails to comply with the confirmation standards of
16 Chapter 12 of the Bankruptcy Code. And in so finding I'm
17 compelled to deny confirmation of the plan.

18 Mr. Foley, I really need your candid and honest
19 input here as to where we go? Ms. Neal's got a motion to
20 dismiss. Mr. Schoen has a trustee's recommendation on file
21 saying that if your debtor can wrestle the cash collateral
22 away from Landview that the case has no history. If there's
23 anyone more optimistic than farmers, it's farmer's lawyers. I
24 really need your good advise on where you think this leaves
25 your client?

1 MR. FOLEY: Judge, I'm not sure that I can -- I can
2 respond quickly. I guess I'd like to -- I understand the
3 issue.

4 THE COURT: Well, and I'm -- I'm interested in Mr.
5 Hipwell having as much a chance as we can possibly give him,
6 in spite of the creditor's protestations. On the other hand
7 the point is, is it is decision time, simply because of the
8 fact it's spring. And so let me propose this. All right?

9 Ms. Neal, I'm going to continue a hearing on your
10 motion to dismiss. And on the trustee's recommendation, I'm
11 going to reserve ruling on whether or not the case is
12 dismissed, converted, whatever, for a very short period of
13 time and let you think your position over. We'll put you on
14 the next available hearing date and we'll listen to your
15 thoughts at that time. Okay?

16 THE CLERK: Your Honor, May 1st, 9:30.

17 THE COURT: That does not stop the debtor, of
18 course, from doing whatever the debtor voluntarily wants to do
19 in the interim with respect to where the case goes. That's
20 the best I can do.

21 Any questions or comments at this time?

22 Okay, I'll sign the minute entry and use that as my
23 order denying confirmation so that no one else has to do one
24 up, including my law clerk.

25 And we'll -- if we don't hear from you sooner, we'll

1 see you back here on the 1st of May.

2 ATTORNEYS: Thank you.

3 THE COURT: Thank you very much.

4 PROCEEDINGS CONCLUDED AT 1:00 P.M.

5 (Court Adjourned)

6 * * * * *

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.

NORTHWEST TRANSCRIPTS, INC.
P.O. BOX 890
NAMPA, IDAHO 83653
(208) 466-2743


FEDERALLY CERTIFIED MANAGER/OWNER

Gayle M. Lutz
TRANSCRIBER

4/30/97
DATE

COPY